Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

PUERTO RICO MARINE MANAGEMENT, INC. *and* LIVERPOOL AND LONDON PROTECTION AND INDEMNITY ASSOCIATION, LTD.,

Petitioners,

versus

PAUL HOOPER,

Respondent.

On Petition For Writ Of Certiorari To The Louisiana Court Of Appeal For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. This Court should grant *certiorari* to clarify the question as to whether an open and obvious hazard which is not sufficient to implicate the turnover duty set forth in *Scindia Steam Navigation Co., Ltd. v. De Los Santos*, 451 U.S. 156, 101 S.Ct. 1614 (1981) as a matter of law can, without any change in the condition, be a hazard which would trigger the duty of a vessel owner to intervene in the stevedore's operation.

2. This Court should grant *certiorari* to clarify whether a vessel owner must have actual knowledge of the unreasonable danger of the situation before there is a duty to intervene and that it cannot have actual knowledge unless the stevedore's forbearance of the condition is so hazardous that anyone can tell it creates an unreasonable risk of harm, even considering the stevedore/employer's expertise.

3. The Court should grant certiorari to resolve a split between the United States Fifth and Ninth Circuit Courts of Appeal on the one hand, and the Louisiana Fourth Circuit Court of Appeal on the other and to clarify and settle the question left open in *Scindia* as to whether the vessel owner has a duty to intervene in a situation where a ship repairman or longshoreman is injured by a hazardous condition, allowed to remain due to the obviously improvident judgment of the vessel repair company/stevedore, when the hazard does not involve the vessel or vessel equipment, even when the vessel owner had actual knowledge of an unreasonably dangerous condition involving non-vessel equipment and of the ship

QUESTIONS PRESENTED – Continued

repair company's/stevedore's failure to rectify the situation. The U.S. Fifth and Ninth Circuits have indicated that there is no duty to intervene if the vessel or vessel equipment is not involved and the vessel owner did not participate in the creation of the hazard and was not actively involved in the operation; whereas, the Louisiana Fourth Circuit treats non-vessel equipment as the equivalent of vessel equipment and finds a duty to intervene.

LIST OF PARTIES

The following are the parties to this proceeding:

1. Paul Hooper,
plaintiff-respondent,

2. Puerto Rico Marine Management, Inc.[1] and Liverpool & London Protection and Indemnity Association Ltd.[2], defendants-petitioners,

3. Dunlap Marine Services, Inc. and Certain Underwriters at Lloyds, defendants-respondents,

4. Highlands Insurance Company,
intervenor-respondent.

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[1] Pursuant to Supreme Court Rule 29.6, Puerto Rico Marine Management, Inc. states that it is owned by The Holt Group a privately held corporation. There are no non-wholly owned subsidiary companies.

[2] Pursuant to Supreme Court Rule 29.6, Liverpool & London Protection and Indemnity Association, Ltd. states that it has no parent or non-wholly owned subsidiary companies.

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Although not designated for publication, the decision of the Louisiana Court of Appeal for the Fourth Circuit, 97-1727 (La. App. 4th Cir. 4/29/98), is reported at 716 So.2d 197 (La. App. 4th Cir. 1998) and is reproduced in Appendix A. (App. pp. 1a-25a.)

On September 4, 1998, the Supreme Court of Louisiana, 98-1436 (La. 9/4/98), denied the applications for writs of *certiorari* filed by petitioners, Puerto Rico Marine Management, Inc. and Liverpool & London Steamship Protection and Indemnity Association Ltd. (both hereinafter "PRMMI"), which is reported at ___ So.2d ___, 1998 WL 757203 and is reproduced in Appendix D. (App. pp. 37a-38a.)

JURISDICTION

On April 29, 1998, the Louisiana Fourth Circuit entered its ruling from which PRMMI seeks review.

PRMMI timely filed its application for writ of *certiorari* or review with the Supreme Court of Louisiana, which that Court denied on September 4, 1998. This Court has jurisdiction pursuant to 28 U.S.C. § 1257 and Rule 10 of the Rules of the Supreme Court.

STATUTORY PROVISION INVOLVED

The following statute of the United States of America is involved in this petition:

33 U.S.C. § 905(b):

In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any arrangements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

STATEMENT OF THE CASE

On March 11, 1992, Paul Hooper, a marine electrician employed by Gulf Best Electric ("Gulf Best") working aboard the SS PONCE, a vessel owned by Puerto Rico Marine Management, Inc. ("PRMMI") was injured as a result of stepping on a high pressure hose laid on the deck of the PONCE by another contractor working aboard the vessel, Dunlap Marine Services, Inc. ("Dunlap"). The position of the hoses on the PONCE is depicted in photographs taken by plaintiff the day after the accident. (Exhibit P2-A, B and C.) (Reproduced in Appendix G, App. p. 54a.)

Hooper and his wife brought suit against PRMMI, Dunlap and their respective insurers. PRMMI was insured by Liverpool & London Steamship Protection and Indemnity Association, Ltd. (for purposes of this petition, Liverpool & London and PRMMI will be collectively referred to as "PRMMI"). The action was tried in the 34th Judicial District Court for the Parish of St. Bernard, State of Louisiana, before the Honorable David S. Gorbaty, without a jury.

Paul Hooper, an experienced marine electrician, had worked with Gulf Best since 1968. Over ninety-five percent of his work was on vessels. In 1992, he spent four to six weeks working as foreman on the PONCE and her sister vessel, the SS FORTELEZA. Hooper worked fifteen days aboard the PONCE, crossing the hoses involved in his injury three to four times each day. Hooper crossed the hoses twenty-five to thirty times prior to his accident. Hooper, the foreman and highest ranking Gulf Best employee on this job, never complained to anyone about

the presence of the hoses, and he did not think the hoses presented a safety hazard until *after* his accident. (Trial Transcript, Vol. 1, p. 79.) (Pertinent testimony is reproduced in Appendix F, App. pp. 41a-42a.) Hooper was uncertain if the hoses were in place when he began work on the PONCE, but the hoses remained basically in the same position the entire time he was on the PONCE and the FORTELEZA. Where he chose to cross the hoses, Hooper estimated he had to step one and one-half to two feet to clear the hoses. At the time of his accident, his job on the PONCE was finished, and Hooper was leaving the vessel for good.

Hooper testified in detail concerning the mechanics of his accident. As he approached the hoses near the top of a ramp – the hoses were not on the ramp, but were on the level deck – Hooper turned slightly to his right and, without slowing down, stepped over the hoses with his left foot. He was not looking at the deck, the hoses or his foot as he stepped and did not see his foot come down on the hose. Hooper felt the hose underneath his foot. He testified the hose pulsated or flexed, which surprised him, causing him to take his left foot off the hose immediately and step further forward with his left foot. When his left foot came down onto the deck, his tools pulled him down to his right knee. Hooper intended to step entirely over the hoses, and admitted possibly he simply did not step as far as he intended, which allowed his foot to come down on the hose. Significantly, Hooper did not fall when he put his foot on the hose, but after he removed his foot from the hose and stepped further forward.

There was an alternate route (a stairway) available to Hooper; however, he testified the stairway was "inconvenient" and/or "impractical." If carrying tools or material, he generally used the ramp to exit the vessel; if not carrying anything, he used the stairway. Additionally, whether he used the ramp or the stairway also depended on where he was working when he needed to ascend or descend a level. Hooper admitted he could have used the stairs on this occasion, but it would have taken more time.

Norman Shows, a marine electrician with nine years at Gulf Best, was working with Hooper on the PONCE on March 11, 1992. Shows testified the hoses could have presented a safety hazard, but admitted he had no trouble crossing the hoses at any time, and that if one were looking where one was going, the hoses could be crossed safely. (Trial Transcript, Vol. 1, pp. 143-44.) (Pertinent testimony is reproduced in Appendix F, App. pp. 42a-44a.)

Lee DelBuno, an experienced marine electrician, worked at Gulf Best for roughly 20 years. He has seen hoses on occasion laid on a deck similar to the situation depicted in photographs of the PONCE and has crossed those hoses safely. DelBuno admitted, while such hoses might present a safety hazard, it was a hazard he could deal with safely if he were careful. (Trial Transcript, Vol. 1, pp. 160-61.) (Pertinent testimony is reproduced in Appendix F, App. pp. 44a-47a.)

Jack Prejeant, Hooper's supervisor at the time of the accident, has been with Gulf Best for 32 years and is an experienced marine electrician. Prejeant testified it is

common to see hoses on the deck of a vessel as depicted in photographs of the PONCE. While he testified at trial that the hoses presented a tripping hazard, he admitted that in his deposition, he had stated that the hoses did not create a hazard or a dangerous situation. Even if the presence of the hoses on the deck of the PONCE did present a hazard, Prejeant conceded at trial it was a hazard that an experienced marine electrician could cross safely if he was careful. (Trial Transcript, Vol. 1, pp. 176-77.) (Pertinent testimony is reproduced in Appendix F, App. pp. 47a-49a.)

Claude Davenport, called by Hooper and accepted by the trial court as an expert in marine safety, testified that in his opinion, the hoses on the deck of the PONCE, as depicted in photographs of the PONCE, were an unsafe condition and a safety hazard. Davenport feels any hose presents a tripping hazard, and pressure hoses are worse, as they pulse or flex when used. Davenport believed hoses should be in a position where no one can trip on them. Davenport faulted PRMMI for failing to properly supervise the work being carried out aboard its vessel.

Davenport admitted that someone with years of experience working on vessels could step safely across the hoses depicted in the photographs if careful. (Trial Transcript, Vol. 1, pp. 218-20.) (Pertinent testimony is reproduced in Appendix F, App. pp. 49a-52a.) Davenport recognized that a skilled repairman can work around dangerous conditions safely. Davenport understands that Hooper just misjudged his step, and did not step as far as he thought he had, thus allowing his foot to come down on the hose. Davenport admitted that had the hoses been encased by crossover planks as he described, if Hooper

misjudged his step, his foot still could have come down on the hoses.

Davenport admitted an alternate route was available, but claimed it was not practical. Davenport feels it is inappropriate to use a stairway if carrying items in both hands. However, he admitted he was aware of nothing to prevent Hooper from carrying items in both hands to the stairs, putting down one item and descending the stairs. At that time, Hooper could have put down the other item and climbed the single flight of stairs to retrieve the first item.

George Duffy, accepted by the trial court as an expert in marine safety, testified it is customary in the marine industry for hoses to be placed directly on deck where workers are expected to walk. The conditions depicted in photographs of the PONCE are not unusual in his opinion. (Exhibit P2-A, B and C.) (Reproduced in Appendix G, App. p. 53a.) Duffy presented an advertising brochure from a ship cleaning company which shows hoses laid out on the deck of a vessel. Likewise, he presented photographs which also show the presence of similar hoses on other vessels. Duffy believed crossover planks are not a practical solution in the marine industry, due to the constant flux of operations during vessel repairs. Duffy agreed with all of the witnesses that the condition of the hoses on deck of the PONCE could be dealt with safely by an experienced ship repairer using reasonable care. (Trial Transcript, Vol. 3, p. 593.) (Pertinent testimony is reproduced in Appendix F, App. pp. 52a-53a.) Duffy further testified that, in considering whether something presents a hazard, it does not matter whether the hazard is present on turnover of the vessel or arises during the

repair operation. A hazardous condition is a hazardous condition.

The trial court found PRMMI fifteen percent at fault for Hooper's March 11, 1992 accident. (Trial Court's Judgment, Appendix C, App. pp. 32a-36a.) The trial court's Reasons for Judgment sets forth the rationale for finding fault on the part of PRMMI. "The Court finds PRMMI fifteen percent at fault because there was a PRMMI employee, the port captain, on board who was aware of the hoses and could have directed that they be moved or re-routed in a safer manner." (Trial Court's Reasons for Judgment, Appendix B, App. p. 27a.) The court found the hoses created an unreasonable risk of harm because they were at the top of a ramp where workers walked frequently, and it was foreseeable that a worker could trip on the hoses. (Trial Court's Reasons for Judgment, Appendix B, App. p. 28a.)

The Louisiana Fourth Circuit Court of Appeal, after briefing and oral argument, issued its opinion on April 29, 1998, reversing in part, remanding in part and otherwise affirming the trial court's judgment. (Court of Appeal Opinion, Appendix A, App. pp. 1a-25a.) Specifically, the court of appeal reversed the award of damages for loss of consortium and remanded to the trial court for an allocation of the pain and suffering damages between past damages and future damages and for a clarification of the amount the trial court intended to award for past lost wages and fringe benefits. The court of appeal affirmed the trial court's allocation of fault.

The Louisiana Supreme Court denied PRMMI's application for writ of *certiorari* on September 4, 1998,

without written reasons. (Denial of Writ, Appendix D, App. pp. 37a-38a.)

On November 17, 1998, the trial court issued its Revised Judgment After Remand, effecting the changes ordered by the Fourth Circuit. (Revised Judgment, Appendix E, App. pp. 39a-40a.)

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD DECIDE IF THE TEST FOR DETERMINING WHETHER A HAZARD EXISTS SUCH AS WOULD TRIGGER THE DUTY TO INTERVENE IS THE SAME AS THE TEST FOR A HAZARD SUCH AS WOULD TRIGGER LIABILITY UNDER THE TURNOVER DUTY.

The law governing an injured worker's rights against a vessel was changed drastically by the 1972 amendments to the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901, *et seq.*, ("LHWCA") which left the scope of the remedy for the courts to decide. The seminal U.S. Supreme Court case following those amendments is *Scindia Steam Navigation Co., Ltd. v. De Los Santos*, 451 U.S. 156, 101 S.Ct. 1614 (1980), in which this Court set forth the duties a vessel owes to longshoremen and harbor workers – "the turnover duty," "the duty to warn" and "the duty to intervene." The duty to warn does not attach to conditions which are open and obvious. *Howlett v. Birkdale Shipping Co., S.A.*, 512 U.S. 92, 114 S.Ct. 2057, 2064 (1994) and *Polizzi v. M/V ZEPHYROS II MONROVIA*, 860 F.2d 147, 149 (5th Cir. 1988) All parties admitted the presence of the hoses on the deck of the PONCE was

open and obvious, thus PRMMI properly was found not to have breached the duty to warn. That left the turnover duty and the duty to intervene to be considered.

Plaintiffs failed to establish whether the hoses were present on the PONCE when Gulf Best began its operations (implicating the turnover duty) or were placed on the deck after Gulf Best's operations had begun (implicating the duty to intervene). Recognizing this, plaintiff's argument on appeal concerned only the duty to intervene. Thus, the court of appeal's opinion addresses only the duty to intervene.

PRMMI believes the law governing the turnover duty remains important, however, because determining whether an open and obvious condition presents a hazard sufficient to breach the turnover duty should involve the same standard as does determining whether that same condition presents a hazard sufficient to trigger the duty to intervene. If a condition is not enough of a danger to breach the turnover duty, it should not be enough of a danger to trigger the duty to intervene, just because it arises during the repair operations. In both situations, the vessel owner should be entitled to rely on the experience and expertise of the stevedore to recognize hazardous conditions and to evaluate whether the longshoremen can work around the hazard in safety.

In *Scindia*, the Court held the turnover duty required the vessel owner "to have the ship and its equipment in such condition that an expert and experienced stevedore [or ship repairer] will be able by the exercise of reasonable care to carry on its cargo [or repair] operations with reasonable safety to persons and property." *Scindia*, 451

U.S. at 167, 101 S.Ct. at 1622 (bracketed language added). The description of the duty includes that the stevedore be an expert and experienced stevedore. "This implies that certain dangers that may be hazardous to unskilled persons need not be remedied if an expert and experienced stevedore could safely work around them." *Bjaranson v. Botelho Shipping Corp., Manila*, 873 F.2d 1204, 1208 (9th Cir. 1989). The shipowner is entitled "to rely on the thesis that the stevedore is an 'expert and experienced' (*sic*) and will act with 'reasonable care.' The shipowner has no duty to anticipate the action or inaction of a careless stevedore." *Polizzi*, 860 F.2d at 149 (citations omitted). The *Bjaranson* court noted that the turnover duty contained in *Scindia* had been more completely set forth in *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404, 89 S.Ct. 1144 (1969), which held that in addition to being expert and experienced, the stevedore must also be "mindful of the dangers he should reasonably expect to encounter." *Federal Marine Terminals*, 394 U.S. at 416 n.18, 89 S.Ct. at 1151 n.18.

The mere presence of a hazard on board the vessel does not establish a breach of the turnover duty, since this duty does not require the vessel be turned over in an "accident-free" condition. In *Bjaranson*, the appellate court noted there was evidence from which the jury could have concluded the allegedly defective ladder presented a hazard to the longshoremen.

> However, such a general conclusion does not in and of itself end the analysis. More is required, namely, the plaintiff must introduce evidence that the hazard was such that an expert and experienced stevedore would not 'be able by the

> exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property.'

Bjaranson, 873 F.2d at 1208, *quoting Scindia*.

In the instant case, the trial court held the condition of the hoses on the deck of the PONCE presented an unreasonable risk of harm. Specifically, the trial court found:

> The Court is of the opinion that the hoses . . . placed across the deck by Dunlap, created an unreasonable risk of harm. The hoses were lying at the top of a ramp where workers walked frequently, carrying tools, and where vehicular traffic passed. It was foreseeable that in this environment, a worker could trip on the hoses.

Reasons for Judgment, Appendix B, App. p. 28a.

PRMMI believes this finding is improper as a matter of law, in that the trial court ignored the special legal relationship between the vessel owner and the stevedore created by the 1972 Amendments to the LHWCA which forms the basis for the wealth of jurisprudence interpreting Section 905(b) of the Act. Particularly, the trial court failed even to consider that PRMMI is allowed to rely on the expertise of the stevedore (ship repairer) and that PRMMI has no duty to anticipate the actions of a careless or inattentive stevedore or electrician.[3]

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[3] Lower courts have uniformly applied the *Scindia* standards to harbor workers, such as Hooper, as well as to longshoremen. *Hill v. Texaco, Inc.*, 674 F.2d 447, 451 (5th Cir. 1982).

Likewise the court of appeal improperly found the hoses to be a hazardous condition for which PRMMI could be liable. In addressing whether the condition of the hoses on the deck was a "hazard," the court of appeal held:

> Leaving hoses for weeks on the deck in front of the entrance to a ramp, which ramp is used by workmen carrying tools and equipment and with their attention focused on their work, was negligent. While the hoses might be crossed safely many times, it is fairly likely that sooner or later someone would trip, and possible hurt (*sic*) falling to the steel deck, sooner or later (*sic*).

Opinion, Appendix A, App. p. 8a.

While this reasoning *might* have been *fairly* appropriate for finding Dunlap liable under a general maritime law negligence theory (it still would be quite a stretch), it in no way supports a finding of a hazardous condition sufficient at law to hold PRMMI liable under the Act. Under Section 905(b), the determination of whether a condition is a "hazard" for which the vessel owner can be liable under the duty to intervene must include a finding that the condition even though "hazardous" still must be such that an expert and experienced stevedore, using reasonable care, could not work in reasonable safety. The Fifth Circuit has held that the stevedore's expertise should be taken into account in determining whether the stevedore's judgment is improvident. *Greenwood v. Societe Francaise De*, 111 F.3d 1239, 1249, *reh. en banc denied*,

117 F.3d 1419 (5th Cir. 1997). Moreover, the stevedore's expertise must be considered in determining whether a hazard exists in the first instance.

In the instant case, in finding that the hoses presented an unreasonable risk of injury, the courts below did not consider the expertise required of Hooper and Gulf Best. The courts found that because it was foreseeable that someone could trip (trial court) or "fairly likely that sooner or later someone would trip" (court of appeal), PRMMI should bear fifteen percent of the fault for the accident. Apparently neither the trial nor the appeal court even considered whether an experienced ship repairer, using reasonable care for his own safety, could work in reasonable safety around the hoses – as all fact witnesses and the two safety experts testified. If either of those courts had considered the proper legal criteria, PRMMI properly could not have been found liable. In point of fact, Hooper was not "working" around the hoses when he claims injury, but was merely walking. Every single witness who testified about the incident or the hoses, *even plaintiff's safety expert, Davenport*, admitted that the condition of the hoses on deck was such that an experienced ship repairer, using reasonable care, could cross the hoses in reasonable safety.

If this had been a case found to involve the turnover duty, it is clear that PRMMI's duty would have been "to have the ship and its equipment in such condition that an expert and experienced stevedore [or ship repairer] will be able by the exercise of reasonable care to carry on its cargo [or repair] operations with reasonable safety to persons and property." *Scindia*, 451 U.S. at 167, 101 S.Ct. at 1622 (bracketed language added). The description of

the turnover duty includes that the stevedore be an expert and experienced stevedore. "This implies that certain dangers that may be hazardous to unskilled persons need not be remedied if an expert and experienced stevedore could safely work around them." *Bjaranson*, 873 F.2d at 1208. The shipowner is entitled "to rely on the thesis that the stevedore is an 'expert and experienced' (*sic*) and will act with 'reasonable care.' The shipowner has no duty to anticipate the action or inaction of a careless stevedore." *Polizzi*, 860 F.2d at 149 (citations omitted). In addition to being expert and experienced, the stevedore must also be "mindful of the dangers he should reasonably expect to encounter." *Federal Marine Terminals*, 394 U.S. at 416 n.18, 89 S.Ct. at 1151 n.18.

PRMMI submits that under the duty to intervene, it likewise must be allowed to rely on that same expertise and experience of the stevedore and to trust that the stevedore will act with reasonable care, which Gulf Best had done until Hooper's act of carelessness in not looking where he was stepping. This proposition is supported by this Court's opinion in *Scindia*, in which, while discussing the shipowner's duty to intervene and repair the defective winch, the Court stated:

> We arrive at the more difficult and recurring issue involved in this case: What are the shipowner's duties when he *learns* that an apparently dangerous condition exists or has developed in the cargo operation, which is known to the stevedore and which may cause injury to the longshoreman?

Scindia, 451 U.S. at 172-73, 101 S.Ct. at 1625 (emphasis added).

> Yet it is quite possible, it seems to us, that Seattle's [the stevedore's] judgment in this respect was so improvident that Scindia, if it knew of the defect and that Seattle was continuing to use it, should have realized the winch presented an unreasonable risk of harm to the longshoreman, and that in such circumstances it had a duty to intervene and repair the ship's winch. *The same would be true if the defect existed from the outset* and Scindia must be deemed to have been aware of the condition.

Scindia, 451 U.S. at 175, 101 S.Ct. at 1626 (emphasis added).

Therefore, this Court should review this case to clarify the issue as to whether an open and obvious hazard which is not sufficient to implicate the turnover duty as a matter of law can, without any change in condition, be a hazard which would trigger the duty of a vessel owner to intervene in the stevedore's operation.

II. THIS COURT SHOULD DECIDE WHETHER, IF TO BREACH THE DUTY TO INTERVENE, A SHIPOWNER MUST HAVE ACTUAL KNOWLEDGE THAT THE HAZARD PRESENTS AN UNREASONABLE RISK OF INJURY AND SHOULD ADOPT THE U.S. FIFTH CIRCUIT'S TEST FOR WHAT IS "OBVIOUSLY IMPROVIDENT" JUDGMENT.

While under certain circumstances, the vessel owner may have a duty to intervene in the stevedore's operations, there are several prerequisites for a vessel owner to be held liable under the duty to intervene. First, the shipowner must be aware of the defect. Second, the defect must present an *unreasonable* risk of harm to the longshoreman. Third, the stevedore must be exercising

obviously improvident judgment by continuing to work in the face of the defect. Finally, the shipowner must have knowledge that the stevedore was acting improvidently in allowing its longshoremen to work in the face of the hazard.

> *Scindia* recognized that the owner's actual knowledge of a dangerous condition which later injured a longshoreman would not in itself make him negligent. It might well be "reasonable" for the owner to rely on the stevedore's judgment that the condition, though dangerous, was safe enough.

Helaire v. Mobil Oil Co., 709 F.2d 1031, 1039 n.12, citing *Scindia*, 451 U.S. at 175, 101 S.Ct. at 1626.

The U.S. Fifth Circuit Court of Appeal recently set forth the criteria for determining if the stevedore's judgment is obviously improvident. "[I]n order for the expert stevedore's judgment to appear 'obviously improvident,' that expert stevedore must use an object with a defective condition that is so hazardous that anyone can tell its continued use creates an unreasonable risk of harm *even when the stevedore's expertise is taken into account.*" *Greenwood*, 111 F.3d at 1249 (emphasis added), citing *Randolph v. Laeisz*, 896 F.2d 964, 971 (5th Cir. 1990) and *Woods v. Sammisa Co.*, 873 F.2d 842, 847 (5th Cir. 1989).

Another panel of the Louisiana Fourth Circuit Court of Appeal has held the duty to intervene arises "when the shipowner has knowledge of the hazard and that the stevedore, in exercising improvident judgment in continuing to work in the face of it, cannot be relied on to remedy the hazard or work around it." *Gaines v. Daiichi Chuo Shipping (American), Inc.*, 673 So.2d 1192, 1195 (La.

App. 4th Cir. 1996). The *Gaines* court went on to hold "a shipowner may be negligent for failing to eliminate an obvious hazard that it could have eliminated, but only when it should have expected that an experienced stevedore could not or would not avoid the hazard and conduct cargo operations in a reasonably safe manner." *Id.* Thus, at least some Louisiana courts also recognize a shipowner can be liable for breach of the duty to intervene and to correct an obvious hazard, *only* if it knew an expert stevedore *could not or would not work safely* around the hazard. This duty is tempered by the theory that the shipowner is entitled to rely on the expertise of the stevedore and has no duty to anticipate the actions of a careless stevedore. *Greenwood,* 111 F.3d at 1249, citing *Randolph v. Laeisz,* 896 F.2d 964, 971 (5th Cir. 1990) and *Woods v. Sammisa Co.,* 873 F.2d 842, 847 (5th Cir. 1989).

The trial court held PRMMI liable effectively on the basis of its "control" of the vessel and because it could have ordered that the hoses be moved or re-routed. Specifically, the trial court held:

> The Court finds PRMMI fifteen percent at fault because there was a PRMMI employee, the port captain, on board who was aware of the hoses and could have directed that they be moved or re-routed in a safe manner.

Reasons for Judgment, Appendix B, App. p. 27a.

PRMMI submits that the reasoning of the trial court conflicts with the established law governing a Section 905(b) action.

In the instant case, the court of appeal's opinion is flawed in that it holds PRMMI liable for breaching the

duty to intervene on the basis of constructive or presumed knowledge of the hazardous condition. Specifically, the court of appeal found:

> In the present case, it is readily apparent, and, indeed, undisputed, that PRMMI's Mr. Sullivan knew of the hoses laid across the deck at the entrance to the ramp and that the employees of the various contractors (including Gulf Best) were crossing the hoses to use the ramp. As the hoses had been there for weeks, and the workmen were crossing them to use the ramp for weeks, it could not have been more apparent that none of the contractors were going to do anything to reroute the hoses or install crossover planks so as to eliminate the tripping hazard. In other words, Mr. Sullivan certainly knew that, unless he ordered the hoses rerouted or crossover planks installed, nothing would be done to eliminate a condition that was so clearly hazardous.

Opinion, Appendix A, App. p. 14a.

The court of appeal's opinion amounts to a finding that PRMMI breached the duty to intervene because Sullivan should have known that no one would remedy the "hazard." This is contrary to the law governing Section 905(b) actions.

> Under *Scindia*, the vessel owner only had a duty to intervene if 1) it had actual knowledge that the . . . [condition] posed an unreasonable risk of harm and 2) actual knowledge that it could not rely on the stevedore to protect its employees and that if unremedied, the condition posed a substantial risk of injury.

Randolph v. Laeisz, 896 F.2d 964, 971 (5th Cir. 1990).

Under this standard, the vessel owner cannot properly be held liable unless it has *actual* knowledge *both* of the existence of the condition and of the "unreasonable" risk presented by the condition.

> There is a distinction between knowledge of a condition and knowledge of the dangerousness of that condition. In *Woods v. Sammisa Co., Ltd.*, 873 F.2d 842, 853 (5th Cir. 1989), we held that it was improper for the jury to be instructed on the third *Scindia* exception because although there was ample evidence that the defendants were aware of the overlapping condition of the cargo, there was no evidence that the defendants were actually aware that an unreasonable risk of harm was thereby created.

Randolph, 896 F.2d at 971.

The basis for this holding is that the vessel owner should have no duty to intervene unless he appreciates the danger of the situation. Therefore, this Court should review this case to clarify that a vessel owner must have actual knowledge of the unreasonable danger of the situation before there is a duty to intervene and that it cannot have actual knowledge unless the stevedore/harbor worker's forbearance of the condition is so hazardous that anyone can tell it creates an unreasonable risk of harm, even considering the employer's expertise.

III. THIS COURT SHOULD DETERMINE IF A VESSEL OWNER HAS A DUTY TO INTERVENE TO CORRECT AN OPEN AND OBVIOUS HAZARD, IMPROVIDENTLY ALLOWED TO REMAIN BY THE EMPLOYER, IF THE OWNER DID NOT PARTICIPATE IN THE CREATION OF THE HAZARD AND WAS NOT ACTIVELY INVOLVED IN THE OPERATION, WHEN THE HAZARD DOES NOT IMPLICATE THE VESSEL OR VESSEL EQUIPMENT.

Assuming *arguendo* that the vessel had knowledge of the dangerous condition and the contractor's obviously improvident failure to correct the condition, since 1) vessel equipment was not involved, 2) the vessel owner did not help create the hazard and 3) the vessel was not actively involved in the operation, there can be no duty to intervene.

In *Scindia*, this Court embarked upon a road interpreting the effect of the 1972 amendments to the LHWCA, resulting in a balanced, practical, realistic and judicially efficient interpretation of Congressional intent. This Court in *Scindia* outlined the three general duties shipowners owe to longshoremen. As summarized by this Court:

> The first, which the courts have come to call the "turnover duty," relates to the condition of the ship upon commencement of the stevedoring operations. . . . The second duty, applicable once stevedoring operations have begun, provides that a shipowner must exercise reasonable care to prevent injuries to longshoremen in areas that remain under the "active control of the vessel". . . . The third duty, called the "duty to

> intervene," concerns the vessel's obligations with regard to cargo operations in areas under the principal control of the independent stevedore.

Howlett v. Birkdale Shipping Co., S.A., 512 U.S. at 98, 114 S.Ct. at 2063 (1994).

Scindia specifically addressed the question:

> What are the shipowner's duties when he learns that an apparently dangerous condition exists or has developed in the cargo operation, which is known to the stevedore and which may cause injury to the longshoreman?

Scindia, 451 U.S. at 172-73, 101 S.Ct. at 1625. In answering this question, this Court specifically limited its response to the situation in which the apparently dangerous condition results from the malfunctioning of the ship's gear. *Scindia*, 451 U.S. at 175, 101 S.Ct. at 1625 ("[W]e agree that there are circumstances in which the shipowner has a duty to act where the danger to longshoremen arises from the malfunctioning of the ship's gear being used in the cargo operations.") The Court's conclusion was based, at least in part, on:

> A possible [regulatory] inference from the provisions already described . . . that when a defective winch is discovered, it should not be repaired by the stevedore but should be reported to and repaired by the shipowner.

Scindia, 451 U.S. at 175, 101 S.Ct. at 1626. Resolution of the issues of the vessel owner's duty regarding unsafe

conditions existing in the cargo stow (resolved by *Howlett, supra*) and the vessel owner's duty when the dangerous condition results from non-vessel equipment was left for a later date.[4]

In *Futo v. Lykes Bros. S. S. Co., Inc.*, 742 F.2d 209 (5th Cir. 1984), the Fifth Circuit was presented with a situation in which a repairman was killed when he fell from scaffolding erected by his employer.[5] In *Futo*, the vessel owner contended that the *Scindia* "duty to intervene" "applies only when the dangerous condition involves the ship's gear or equipment." Conversely, the plaintiff contended "that a shipowner may be responsible for any dangerous condition aboard the ship provided only that the owner or crew had knowledge of the condition." *Futo*, 742 F.2d at 211. In answering the question, the Fifth Circuit noted that the "most basic" principle enunciated by the *Scindia* court that governs the duty of a vessel toward a stevedore is that the "primary responsibility for the safety of the longshoremen rests upon the stevedore." *Futo*, 742 F.2d at 213, *quoting Scindia*, 451 U.S. at 170, 101 S.Ct. at 1623.

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[4] Some courts have recognized that the legal duties should vary when vessel equipment is not implicated, *e.g., Casaceli v. Martech International, Inc.*, 774 F.2d 1322, 1328 (5th Cir. 1985) ("A distinction between defects in the ship itself and its gear, and defects not directly related to the ship, is logical since the owner is primarily responsible for the ship, gains the most from its proper maintenance, and can usually best comprehend the danger from the defect in the ship, its gear or equipment.")

[5] There appears to be no dispute that the basic *Scindia* framework applies to LHWCA – covered employees of independent contractor such as repairmen, and not just longshoremen. *See* footnote 1.

The Fifth Circuit further noted that in *Futo*, as in the instant case, the claim concerns a failure to act on the part of the vessel owner rather than active negligence on its part, stating, "it is a fundamental principle of tort law that one cannot be liable for negligence based on a failure to act unless one first has a duty to act." *Futo*, 742 F.2d at 214. The Fifth Circuit explained:

> This principle is reflected in the general rule that one employing an independent contractor . . . is normally not under a duty to take affirmative action to protect the employees of that independent contractor from injury in the course of the contracted for work. (Citations omitted) . . .

Futo, 714 F.2d at 214.

The Fifth Circuit noted that there are exceptions to the general rule such as when the party employing the independent contractor retains controls over "operative details" and in situations regarding the "condition of the premises" based upon the Restatement (Second) of Torts, §§ 343 and 344(a). However, the Fifth Circuit noted:

> But not every dangerous situation created by the operations of the independent contractor is a condition of the premises for this purpose with respect to the contractor's employees merely because of its location on the land.

Id.

Quoting *Shell Oil Company v. Waxler*, 652 S. W. 2d 454, 457 (Tex. App.-Houston [1st Dist.] 1983, *writ ref'd* N.R.E.), the Fifth Circuit stated:

> As a general rule, a land owner has no duty to protect employees of an independent contractor from a dangerous condition brought on the land, and maintained, and controlled by the independent contractor.

Id.

Although the Fifth Circuit concluded that "to impose a duty to intervene on the shipowner, respecting dangers not created by it which are obvious to the stevedore's employees and arise during and in the area of the stevedore's operations, *something more* is required than the mere ship board location of the dangerous situation and the shipowner's knowledge of it", the court did not "categorically rule" that the something more must always involve "a defective condition of the ship itself, its gear, or equipment." *Id.* at 215. However, the court noted that in the situation before the court, "[n]othing that the shipowner did, and nothing about the ship itself, or any operation of it, contributed to the hazard." Where the danger posed is open and obvious and the contractor was in the best condition to correct it, even if the vessel owner had actual knowledge of the danger and actual knowledge that it could not rely on the stevedore to remedy the situation, it could not be liable under the circumstance. Therefore, despite the court's *proviso*, it does seem involvement with the vessel or the vessel's equipment is a *sine qua non* for liability. This Court should clarify this question as a non-specific possibility of "something more" leads to increased litigation due to uncertainty and unwarranted settlements, resulting in reimbursement to negligent stevedores to avoid the uncertainty. Later Fifth Circuit cases, though reaching the correct result, continue

the uncertainty and confusion. *See, e.g., Fontenot v. United States*, 89 F.3d 205 (5th Cir. 1996) (six factors to weigh to determine if there is duty to intervene); *Casaceli v. Martech International, Inc.*, 774 F.2d 1322 (5th Cir. 1985).

The Fifth Circuit's decision in *Futo* was succinctly, and we believe correctly, summarized as follows:

> . . . where an open and obvious danger aboard the vessel does not involve the ship itself, its gear, or equipment, but rather arose as the result of a transitory condition created entirely by the contractor, the shipowner has no duty to intervene and correct the hazardous condition simply because it is present on his vessel, and the vessel owner is aware of the existence of the condition. Where the open and obvious hazardous condition is created and used entirely by the contractor and the shipowner has assumed no duty with respect to the hazardous condition, the shipowner has no duty to intervene, even if it possesses the full measure of actual knowledge required by *Helaire*. *Futo v. Lykes Bros. S. S. Co., Inc.*, 742 F.2d 209, 218 (5th Cir. 1984).

Bass v. Aetna Cas. & Sur. Co., 727 F. Supp. 312, 317 (S.D. Miss. 1988).[6]

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[6] The Fifth Circuit in *Helaire*, 709 F.2d at 1039 stated, " . . . the vessel owner can be held liable for injuries to employees of the [contractor] resulting from open and obvious dangers only in the event of actual knowledge of the danger *and* actual knowledge that he cannot rely on "the contractor" to remedy the situation." *Helaire* involved the rocking of the vessel due to heavy seas, an open and obvious condition considered part of the vessel.

Recently in *Quevedo v. Trans-Pacific Shipping, Inc.*, 143 F.3d 1255 (9th Cir. 1998) Associate Justice White (ret.), sitting by designation, speaking for the Court, was presented with a situation involving an open and obviously dangerous stow which was being discharged in a dangerous manner by the stevedore. The vessel's chief mate warned the stevedore of the danger but did not intervene to turn the power off to the crane being used to lift the loads. Of interest for present purposes is Justice White's apparent endorsement of the district court's criteria for the triggering of the vessel owner's duty to intervene. Specifically, there is no duty to intervene unless vessel owners:

> (1) know of a hazardous condition; (2) realize or should have realized that the condition presents an unreasonable risk of harm to the longshoreman; (3) know that the stevedore has failed to remedy the situation; and (4) *helped to create the hazard*.

Quevedo, 143 F.3d at 1260 (emphasis added).

In *Quevedo*, the Ninth Circuit indicates that if the dangerous condition does not involve ship's equipment, there is no duty for the vessel owner to intervene unless it has "helped to create the hazard."

Futo and *Quevedo* are both consistent with the balancing and allocation of responsibilities set forth in *Scindia*. The cases balance the propositions that the independent contractors are primarily responsible for the safety of their employees and that the vessel owner should not be responsible for the negligence of the stevedore or the stevedore's misuse of non-vessel equipment against the vessel owner's duty to present a reasonably safe *vessel*

and *equipment*, breach of which obligation can give rise to a duty to intervene under certain circumstances when the vessel's own equipment or Stevedore's use of vessel equipment is unreasonably dangerous.

Further, *Futo* and *Quevedo* are consistent with the legislative history which indicates the vessel owner should not be liable "for gear or equipment of the stevedore or employees of the stevedore subject to this act whether used aboard, or ashore." S. Rep. No. 92-1125, p. 10 (1972) cited in *Scindia*, 451 U.S. at 168-69 n.15, 101 S.Ct. at 1623 n.15.

To create a duty to intervene when the hazardous equipment is not the vessel's, in a situation in which the stevedore employer has an affirmative regulatory duty[7] to rectify the condition (if it is unreasonably hazardous) is in this instance, contrary to general tort principles and effectively makes the vessel owner the insurer of the harbor worker's employer. The creation of such an unfounded duty also results in a situation in which a vessel owner is not liable if the stevedore's use of non-vessel equipment is merely negligent but is liable if the stevedore's use is obviously improvident, and results in a full recovery by the improvident stevedore for all compensation it pays to the injured man. This is an obvious disincentive for the stevedore to act prudently to ensure its employees' safety where the stevedore is both practically and legally in the best position to ensure the safety of its men.

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[7] 29 C.F.R. § 1915.91 ("Hoses . . . shall be elevated or placed under the walkway . . . or covered by adequate crossover planks.")

This Court, therefore, should review this case to clarify that the duty to intervene exists only if the ship or ship's equipment is involved, or if the ship helped to create the hazard or was actively controlling the operation.

CONCLUSION

As set forth above, this Court should grant certiorari to further refine and to clarify the balance of legal duties between the vessel owner and the stevedore/harbor worker employer, particularly as regards the vessel owner's duties to intervene to correct open and obvious conditions which do not involve the vessel or vessel equipment.

Respectfully submitted,

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NOT DESIGNATED FOR PUBLICATION

PAUL RICHARD HOOPER, ET AL.

versus

DUNLAP MARINE SERVICES, INC., ET AL.

NO. 97-CA-1727

COURT OF APPEAL
FOURTH CIRCUIT
STATE OF LOUISIANA

APPEAL FROM 34th JUDICIAL DISTRICT COURT, ST. BERNARD PARISH
NO. 72-337, DIVISION "B"
HONORABLE DAVID S. GORBATY, JUDGE

JOAN BERNARD ARMSTRONG
JUDGE

(Court composed of Judge Denis A. Barry, Judge Joan Bernard Armstrong and Judge Philip C. Ciaccio)

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APR 29 1998

REVERSED IN PART;
REMANDED IN PART;
AND OTHERWISE AFFIRMED.

This is a maritime personal injury case. The plaintiff, an employee of a ship repairer (i.e. a marine electrical contractor), was injured while working aboard a vessel docked in the Mississippi River. Specifically, he was injured when he tripped over a hose laid on the deck by another contractor. He sued that other contractor as well as the vessel owner. Following a bench trial, the trial court found both defendants liable, but also assessed comparative fault of the plaintiff and fixed and various amounts of special and general damages. All three parties appeal as to various aspects of liability and quantum of damages. Based upon binding caselaw, we must reverse an award to the plaintiff's wife for loss of consortium and reverse and remand for certain further findings as to prejudgment interest on general damages. Also, we vacate the awards of past and future lost wages and fringe benefits and remand for a trial court determination

of whether there was an error in the judgment (from what was intended by the trial court) as to those amounts. Otherwise, we affirm the judgment of the trial court.

Defendant Puerto Rico Marine Management, Inc. ("PRMMI") was the owner of the vessel involved in this case, the S.S. Ponce. PRMMI engaged Boland Marine to perform certain work aboard the S.S. Ponce while the vessel was docked in the Mississippi River at Violet, Louisiana. Boland Marine subcontracted the installation of various alarm systems aboard the S.S. Ponce to the plaintiff's employer, Gulf Best Electric. PRMMI engaged Dunlap Marine Services, Inc. to clean tanks aboard the S.S. Ponce. While this work was going on, PRMMI had its port captain, Richard Sullivan, aboard the S.S. Ponce.

Plaintiff Paul Richard Hooper[1], after having finished work on the S.S. Ponce on March 11, 1992, headed for a ship's ramp to leave the vessel. He was carrying a twenty pound tool belt in one hand and an eight to ten pound portable drill motor in the other hand. He was preceded by another Gulf Best electrician, Norman Shows who had his back to Mr. Hooper. There were three hoses laid across the deck so that they crossed the entrance to the ship's ramp. Two of the hoses were black water hoses and belonged to defendant Dunlap Marine. The third hose was orange and belonged to Boland Marine. Photographs of the hoses, which show them as they were at the time of

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[1] Mr. Hooper's wife, Louise S. Hooper, is also a plaintiff, and asserts a claim for loss of consortium. Highlands Insurance Company, which paid Mr. Hooper compensation benefits, intervened as a plaintiff, and has adopted the arguments of Mr. Hooper's brief on appeal.

the accident, show that they are plainly visible on the deck. There are two boards in the general vicinity of the hoses, but they are not snug up to the hoses and the hoses are not in any way covered or otherwise secured to prevent anyone from tripping over them.

Mr. Hooper testified that, as he went to step over the hoses, his left foot stepped onto one of the hoses, the hose pulsated and flexed, and he tripped and fell to the deck. He testified that he was not looking down as he was walking but that, after he fell, his left foot (the one on which he tripped) was near one of the black Dunlap Marine hoses and not near the orange Boland Marine hose. Also, he testified that he had seen the black Dunlap Marine hoses, which were high pressure hoses attached to nearby pumps and used for cleaning tanks, pulsate and flex the way he had felt the hose under his left foot.

After he fell, Mr. Hooper felt great pain in his lower back. He called out to Mr. Shows who was ahead and with his back to Mr. Hooper, stating that he had fallen and twisted his back. Mr. Hooper regained his feet and he and Mr. Shows went to another ship but, because Mr. Hooper was in great pain, Mr. Shows did the work on that ship. Mr. Hooper reported his accident to his employer, Gulf Best, about two hours or so after it happened. Mr. Hooper also called the office of his doctor, Dr. Ruel, and went to see Dr. Ruel the next day, March 12, 1992.

Mr. Hooper had a history of back pain and back injuries, which will be discussed in detail below, but testified that he was in fairly good physical condition at the time of the accident at issue. He also testified that,

from the time of the accident at issue, he suffered great pain and eventually had to have extensive back surgery. He never returned to work following the accident at issue.

There is no dispute that Mr. Hooper was injured aboard a vessel in navigable waters and that his accident had a connection to a maritime activity (ship repair). Therefore, his tort claims are governed by federal maritime law. *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 115 S. Ct. 1043 (1995); *Coats v. Penrod Drilling Corp.*, 61 F.3d 1113 (5th Cir. 1995). Also, because Mr. Hooper's accident occurred upon navigable waters of the United States, and because he was engaged in ship repair, he is covered by the federal Longshore and Harbor Workers' Compensation Act. 33 U.S.C. § 902(3), § 903. Under the LHWCA, Mr. Hooper's remedy against his employer, Gulf Best, is limited to statutory benefits (which are not at issue in this case) but he retains the right to bring tort claims against alleged third party tortfeasors such as PRMMI and Dunlap Marine. T. J. Schoenbaum, *Admiralty and Maritime Law* § 7-10 (2d 1994). Because PRMMI is the owner of the vessel upon which the accident occurred, Mr. Hooper's claim against PRMMI is governed by a specific provision of the LHWCA, 33 U.S.C. § 905(b), and a specialized body of caselaw which has grown up under the statutory provision, *see, e.g. Scindia Steam Navigation Co., Ltd. v. De Los Santos*, 451 U.S. 151, 101 S.Ct. 1614 (1981), which will be discussed in detail below. On the other hand, Mr. Hooper's claim against Dunlap Marine is governed, not by any specific provision of the LHWCA, but by general maritime law, *see, e.g., Melerine v. Avondale Shipyards, Inc.*,

659 F.2d 706, 708 (5th Cir. 1981), and the duty of Dunlap Marine to Mr. Hooper was "the usual negligence duty of reasonable care under the circumstances." *Id.*

Because many of the issues raised upon appeal by the parties constitute challenges to the factual findings of the trial court, we note that, despite the fact that federal maritime law is generally applicable in this case, the Louisiana standard of appellate review of trial court findings of fact is applicable. *Milstead v. Diamond M Offshore, Inc.*, 95-2446 (La. 7/2/96), 676 So.2d 89. Thus, the trial court's findings of fact may not be disturbed upon appeal unless they are manifestly erroneous/clearly wrong. *E.g., Syrie v. Schilhab*, 96-1027 (La. 5/20/97), 693 So.2d 1173; *Stobart v. State Dept. of Transportation and Development*, 617 So.2d 880 (La. 1993). Thus, if a trial court finding of fact is reasonable, it must be upheld on appeal. *Id.*

Dunlap Marine argues that its hoses, laid across the deck in front of the entrance to the ship's ramp, did not present an unreasonable risk of harm because the tripping hazard they presented was "open and obvious" and because they could be crossed safely by someone exercising sufficient case. Dunlap points out that its hoses had been in place for some time, that Mr. Hooper had crossed them safely on numerous occasions on prior work days and that he had crossed them safely several times on the day of the accident. Various witnesses testified that it is not all that unusual for hoses to be laid on ships' decks.

However, Mr. Hooper's marine safety expert witness, Captain Claude Davenport, testified that good marine repair practice requires that hoses not be laid on the deck in front of ramps and that, instead, the hoses should be

suspended overhead, routed under the ramp or covered by snug crossover planks so as to minimize the tripping hazard. The trial court, in its written Reasons For Judgment, specifically stated that it agreed with Captain Davenport's opinion. Mr. Hooper and Mr. Shows testified as to Gulf Best suspending overhead hoses or electric conductors (i.e. electric cords) on other vessels and Mr. Hooper testified as to having seen other contractors suspending overhead hoses on the S.S. Ponce.

An OSHA regulation governing ship repair operations, which was introduced into evidence at trial, requires that: "Hoses and electric conductors shall be elevated or placed under the walkway or working surfaces or covered by adequate crossover planks." 29 C.F.R. Sec. 1915.91. Dunlap Marine argues that the OSHA regulation is binding upon *employers* and that, as it was not Mr. Hooper's employer, in cannot be held liable for violating the regulation. Dunlap Marine is correct to the extent that, as a non-employer of Mr. Hooper, it cannot be found negligent per se for a violation of the OSHA regulation. *Melerine*, 693 F.2d at 712. However, violation of the OSHA regulation could properly be considered as evidence of negligence as a matter of fact which evidence the trial court as finder of fact could accept or reject as it saw fit. *Melerine*, 693 F.2d at 712 n.22. The trial court chose to utilize the OSHA regulation in a manner perfectly consistent with the *Melerine* decision and, in its written Reasons For Judgment, stated that "under the facts of this case, the Court is not bound to follow OSHA regulations, [but] they do serve as a guideline for good safety practices aboard ships." Also, the plaintiff's safety expert witness, Captain Davenport, testified that the

OSHA regulation was identical to good practive [sic] in the marine industry. Dunlap Marine's safety expert witness, George Duffy, disagreed with Captain Davenport on this point and more generally, but the trial court specifically found that it was "not persuaded" by Mr. Duffy, apparently because he had given testimony in another case which the trial court felt was inconsistent with his testimony in this case.

In light of the foregoing, we cannot say that the trial court was clearly wrong/manifestly erroneous in its finding that the Dunlap Marine hoses on the deck posed an unreasonably dangerous hazard of causing someone to trip and fall to the steel deck. Leaving hoses for weeks on the deck in front of the entrance to a ramp, which ramp is going to be used by workmen carrying tools and equipment and with their attention focused on their work, was negligent. While the hoses might be crossed safely many times, it is fairly likely that sooner or later someone would trip, and possibly hurt falling to the steel deck, sooner or later. No doubt that is why the OSHA regulation makes no exception for "open and obvious" hoses.

Dunlap Marine argues next that no accident occurred and that, instead, Mr. Hooper staged the whole tripping incident. Dunlap Marine points to Mr. Hooper's testimony that Mr. Shows was not far ahead of him when he fell and that he dropped his tools when he fell and to Mr. Shows' testimony that he did not hear Mr. Hooper fall or hear Mr. Hooper's tools hit the deck. However, Mr. Shows also testified that it may have been noisy on the portion of the ship where the accident occurred because Dunlap Marine's pumps were nearby and that, because he was first questioned about the accident years after it

happened, he did not have a clear memory of the accident. Dunlap Marine also points out that Mr. Hooper testified to getting back to his feet a minute or two after he fell whereas Mr. Shows testified that he turned around as soon as Mr. Hooper yelled and that Mr. Hooper was already standing. But, again, Mr. Shows professed to have a poor recollection of the accident. Lastly, Dunlap Marine argues that Mr. Hooper, who had a history of back problems, had a motive to fake an accident and take "early retirement." But, the trial judge heard and saw the testimony of Mr. Hooper and chose to believe him. Such questions of credibility are primarily the responsibility of the finder of fact and we cannot say that the trial court was clearly wrong/manifestly erroneous choosing to credit Mr. Hooper's testimony.

Next, Dunlap Marine argues that there was no proof that Mr. Hooper tripped on one of Dunlap Marine's black hoses rather than Boland Marine's orange hose. However, Mr. Hooper testified that, as soon as he fell, he looked and saw that his left foot (the one on which he tripped) was near one of the black hoses and some distance from the orange hose. Mr. Hooper was unequivocal in his testimony that he tripped on a black hose and not on an orange hose. There was no evidence to contradict Mr. Hooper's testimony on this point. Obviously, the trial court believed Mr. Hooper's testimony. Such questions of credibility are primarily for the finder of fact, with its opportunity to observe the witness, and we cannot say that the trial court was clearly wrong/manifestly erroneous in finding that Mr. Hooper tripped on Dunlap Marine's hose.

The trial court assessed 25% comparative fault to Mr. Hooper because: "He could have used an alternate, albeit less convenient, route [a stairwell] to exit the ship." Dunlap Marine argues that the assessment of comparative fault of Mr. Hooper should be increased to at least 70% while Mr. Hooper argues that the assessment of his comparative fault should be decreased to no more than 10%. Obviously, Mr. Hooper could have avoided the hoses altogether by using the stairwell rather than the ramp. On the other hand, the plaintiff's safety expert, Captain Davenport, opined that it would have been less safe for Mr. Hooper to use the stairwell in view of the heavy load he was carrying. Also, the fault of Dunlap Marine in laying hoses on the deck in front of the ramp must be considered in the context of testimony that various workmen, not just Mr. Hooper, would routinely use the ramp.

Dunlap Marine also argues that Mr. Hooper should have been more careful, particularly looking down at his feet, as he approached the hoses. But, the proper division of Mr. Hooper's attention between the hoses as immediate obstacles, the route to be taken, and the need to negotiate the upcoming ramp, as well as the load he was carrying, is a subjective matter as to which reasonable minds could differ.

Dunlap Marine argues that Mr. Hooper should have taken some action or made some request, prior to the time of his accident, to have the hoses rerouted from the ramp area. But, the hoses were not in Gulf Best's immediate work area and there was evidence that, under marine industry custom, employees of one contractor are not expected to "police" the safety-related activities of other contractors in the other contractors' work areas.

Dunlap Marine argues that Mr. Hooper was comparatively negligent because, well prior to the time of the accident, he had had lower back problems and his doctor, Dr. Ruel, had suggested to Mr. Hooper that he work at a lighter duty occupation. This point is not relevant because Mr. Hooper was not hurt when engaged in some strenuous activity (e.g. heavy lifting) but, instead, while simply walking across the deck. Moreover, Mr. Hooper had been a marine electrician almost his whole adult life, had an eighth grade education, and earned more than $50,000 a year. While we cannot speak categorically to the issue, we are not likely to come easily to the conclusion that a party found negligent (Dunlap Marine in this case) should have its liability reduced because a working man with a family has not given up his livelihood.

Obviously, there was evidence at trial and there are considerations each as to the degree of Mr. Hooper's comparative fault. We cannot say that the trial court was clearly wrong/manifestly erroneous in assessing 25% comparative fault to Mr. Hooper.

We turn next to the trial court's assessment of 15% fault of PRMMI. Dunlap Marine argues that the assessment of PRMMI's fault should be at least equal to that of Dunlap Marine's. PRMMI argues that no fault should have been assessed against it. Mr. Hooper argues that fault was assessed properly against PRMMI. The trial court, in its written Reasons for Judgment, stated: "The Court finds PRMMI fifteen percent at fault because there was a PRMMI employee, the port captain, on board who was aware of the hoses and could have directed that they be moved or re-routed in a safer manner." There was testimony that the PRMMI port captain, Mr. Sullivan, was

aboard the S.S. Ponce, was aware of the location of the hoses, and did nothing to have them rerouted away from the ramp although he had the authority to do so.

The cause of action for negligence by a ship repairer's employee, such as Mr. Hooper, against a vessel owner, such as PRMMI, is governed by a specific provision, 33 U.S.C. § 905(b), of the LHWCA. The duties of the vessel owner to the ship repairer's employee were defined in *Scindia Steam Navigation Co. Ltd. v. De Los Santos*, 451 U.S. 156, 101 S.Ct. 1614 (1981).

The three *Scindia* duties are:

1. The "turnover duty" to provide safe conditions and a duty to warn of known, non obvious hazards when the ship owner turns over the ship to the stevedore, ship repairer or other contractor upon commencement of the stevedore's, ship repairer's or other contractor's activities;

2. The duty to exercise reasonable care to longshoremen, ship repairer's employees, or other contractor's employees in areas of the vessel that remain under active control of the vessel owner; and

3. The "duty to intervene," arising when the vessel owner has knowledge of the hazard and that the stevedore, ship repairer or other contractor, in exercising improvident judgment in continuing to work in the face of it, cannot be relied on to remedy the hazard or work around it.

Gaines v. Daiichi Chuo Shipping (American), Inc., 95-1597 (La. App. 4th Cir. 4/24/96), 673 So.2d 1192, 1195; *Howlett*

v. Birkdale Shipping Co. S.A., 512 U.S. 92, 114 S.Ct. 2057, 2063 (1994). Although *Scindia* and most cases following it involve stevedore contractors and their longshoremen employees, the *Scindia* duties also are applied to cases involving ship repairer contractors and other contractors covered under the LHWCA and their employees. *Manuel v. Cameron Offshore Boat, Inc.*, 103 F.3d 31, 33 n.6 (5th Cir. 1997); T. J. Schoenbaum, *Admiralty and Maritime Law* § 7-10 at 442 n.47 (2d 1994).

The turnover duty apparently governs the vessel owner's conduct *before* the stevedore, ship repairer or other contractor's operations have begun. *Woods v. Sammisa Co., Ltd.*, 873 F.2d 842, 847 (5th Cir. 1989), *cert. denied*, 493 U.S. 1050, 110 S.Ct. 853 (1990). In this case, the hoses in question were placed as part of Dunlap Marine's operations and thus PRMMI's conduct before the commencement of Dunlap Marine's (and presumably Gulf Best's) operations cannot be an issue. In any case, Mr. Hooper does not argue that there was any breach of the turnover duty of PRMMI. Also, it does not appear that the area of the S.S. Ponce where the hoses were placed was under the "active control" of PRMMI (as opposed to control of the various contractors) at the time of the accident so the second *Scindia* duty is not implicated.

However, Mr. Hooper argues that PRMMI breached its third *Scindia* duty, the duty to intervene, because PRMMI's port captain, Mr. Sullivan, knew of the placement of the hoses in front of the ramp and did nothing to remedy that dangerous condition. The vessel owner breaches the duty to intervene only if the vessel owner has actual knowledge of *both* the hazardous condition *and* that the stevedore, ship repairer or other contractor, in

exercising improvident judgment in continuing to work in the face of the hazardous condition, cannot be relied upon to remedy the hazard or work safely around it. *Gaines*, 673 So.2d at 1195. *See also, Greenwood v. Societe Francaise De*, 111 F.3d 1239, 1248-49 (5th Cir.), *cert denied*, 118 S.Ct. 558 (1997).

> *Scindia* makes it plain, however, that there are circumstances in which a stevedore's [or ship repairer's] judgment will be so "improvident" that the [vessel] owner/operator, if it has the requisite actual knowledge of the situation, is required to overrule the stevedore's [or ship repairer's] judgment and take steps to correct a hazard. Similarly, it is the acknowledged rule in this circuit that *a stevedore's [or shiprepairer's] decision to proceed in the face of an open and obvious hazard will not automatically immunize a [vessel owner] defendant from section 105 (b)* [sic] *liability.*

Woods, 873 F.2d at 854 (emphasis added).

In the present case, it is readily apparent, and, indeed, undisputed, that PRMMI's Mr. Sullivan knew of the hoses laid across the deck at the entrance to the ramp and that the employees of the various contractors (including Gulf Best) were crossing the hoses to use the ramp. As the hoses had been there for weeks, and the workmen were crossing them to use the ramp for weeks, it could not have been more apparent that none of the contractors were going to do anything to reroute the hoses or install crossover planks so as to eliminate the tripping hazard. In other words, Mr. Sullivan certainly knew that, unless he ordered the hoses rerouted or crossover planks installed, nothing would be done to eliminate a condition that was so clearly hazardous. The issue of whether the vessel

owner breached the duty to intervene is one of fact so that the fact finder's finding as to that issue may not be disturbed upon appeal unless it is clearly wrong/manifestly erroneous. *Gaines*, 673 So.2d at 1195-96. In view of the evidence in this case, we cannot say that the trial court was manifestly erroneous/clearly wrong in finding a breach of PRMMI's duty to intervene and in assessing 15% fault to PRMMI.

Turning to damages, Dunlap Marine and PRMMI both point out that, long prior to the accident at issue, Mr. Hooper had a medical history of back problems and that his claims of injury in the present case also relate to his back. Mr. Hooper concedes his pre-accident history of back problems but claims that his fall aboard the S.S. Ponce greatly aggravated his pre-existing back condition and rendered him incapable of working any longer as well as causing him to undergo major back surgery and to suffer great physical pain, psychiatric problems and sexual dysfunction.

> Under the Jones Act *and the general maritime law*, when the defendant's act aggravates or accelerates a pre-existing condition and renders a plaintiff unable to continue his work or awakens a dormant condition that causes a plaintiff to experience pain when he did not suffer from pain or disability prior to the aggravation, defendant can be liable in full for the disability and pain caused.

Milstead v. Diamond M Offshore, Inc., 94-1582 (La.App. 3rd Cir. 9/6/95), 663 So.2d 137, 149 (emphasis added), *aff'd in pat* [sic] *rev'd in part on other grounds*, 95-2446 (La.

7/2/96), 676 So.2d 89. "If a defendant's conduct aggravates a pre-existing injury or condition, the defendant must compensate the victim to the full extent of the aggravation." *Gaines*, 673 So.2d at 1197 (LHWCA § 905(b) case).

The evidence was that Mr. Hooper was treated for back problems by Dr. Ruel from as early as 1982. Also, Mr. Hooper was treated by Dr. Ruel for a back injury during 1987. Two bulging discs were diagnosed at that time. Also at that time, Dr. Ruel suggested surgery but, after obtaining a second opinion, Mr. Hooper decided against surgery, elected conservative treatment, and continued to work. Mr. Hooper underwent MRI testing and was otherwise followed by Dr. Ruel over the next five years, until the time of the accident at issue, and Mr. Hooper's diagnosis stayed the same. Mr. Hooper testified that, between 1987 and his March 1992 accident, he had occasional flare-ups of his back problems, and missed some time from work, but that his back problems always went away and he would go back to work. He was able to continue golfing and running during 1987-92. For example, he ran in the Crescent City Classic in 1991. He worked considerable overtime and generally led a normal life. After the accident he suffered immediately from great pain. He saw Dr. Ruel soon after the accident. Dr. Ruel testified that Mr. Hooper was getting worse after the accident. Mr. Hooper could no longer run and began to gain weight. He was never able to work again after his accident. In early 1993, Mr. Hooper told Dr. Ruel that he was no longer able to stand the pain and he would undergo surgery. Dr. Ruel performed major back surgery

upon Mr. Hooper on April 14, 1993. This surgery consisted of a two-level lumbar fusion with accompanying laminectomies and a discectomy. This was much more extensive surgery than Dr. Ruel had suggested before Mr. Hooper's accident. Also, Mr. Hooper began to suffer from psychiatric problems. Dr. John MacGregor, Mr. Hooper's treating psychiatrist, testified that Mr. Hooper suffered from mixed anxiety disorder as a result of his inability to continue to work. Mr. Hooper testified as to his short temper and irritability because of his injury. Testimony by friends and co-workers established that Mr. Hooper's personality changed as a result of the accident. Dr. Baptiste Brunner, Mr. Hooper's treating urologist, testified that Mr. Hooper suffers from sexual dysfunction which has several contributing causes including the back pain from the injury at issue. The trial court specifically found, in its written Reasons For Judgment, that: "Based on all the expert testimony, this Court finds that Mr. Hooper's injury and subsequent medical conditions are directly related to his accident of March 11, 1992." Based upon the evidence in this case, we cannot say that this finding of fact was clearly wrong/manifestly erroneous.

Dunlap Marine and PRMMI argue that the trial court awarded excessive general damages and that such damages should be reduced. Mr. Hooper argues that the trial court awarded inadequate general damages and that such damages should be increased. The trial court awarded damages of: $200,000 for physical pain and suffering (including sexual dysfunction); $100,000 for mental anguish and emotional pain including sexual dysfunction; and $100,000 for permanent disability. The trial court has "vast" discretion in fixing the amount of such

general damages. *Andrus v. State Farm Mut. Auto. Ins. Co.*, 95-801 (La. 3/22/96), 670 So.2d 1206; *Theriot v. Allstate Ins. Co.*, 625 So.2d 1337 (La. 1993); *Youn v. Maritime Overseas Corp.*, 623 So.2d 1257 (La. 1993). Considering the testimony of Mr. Hooper and his physicians, we cannot say that the trial court abused its discretion in setting the amount of general damages. Even considering the extent of Mr. Hooper's pre-existing condition, he suffered serious aggravation of his back problems as a result of his accident on the S.S. Ponce, and substantial general damages are justified. The trial court properly awarded such substantial general damages.

Dunlap Marine argues that the trial court erred in awarding Mr. Hooper past medical expenses. The parties stipulated that Mr. Hooper's medical expenses from the date of the accident were $69,747.48 (which amount the trial court awarded) but did not stipulate as to whether those medical expenses were caused by the accident at issue. Thus, Mr. Hooper had the burden of proving that he incurred those past medical expenses due to the accident at issue. *See e.g., Warner v. City of New Orleans*, 96-1296 (La. App. 4th Cir. 5/30/97), 694 So.2d 1231, 1233, *writ denied*, 97-2037 (La. 11/14/97), 703 So.2d 626. Dr. Ruel testified that Mr. Hooper's condition got much worse after the accident. Mr. Hooper also testified that, as of the time of the accident, he was in "pretty good shape" and that he was seeing Dr. Ruel for routine follow-up visits every six to eight weeks. If that pattern had continued, Mr. Hooper would have incurred only minimal medical expenses in the period from the date of the accident to the date of the trial. We cannot say that the trial court

was clearly wrong/manifestly erroneous in its award of past medical expenses.

Dunlap Marine argues that the trial court erred in its award of $139,000 for future medical expenses and loss of services. Also, PRMMI, as well as Dunlap Marine, objects to any award of future psychiatric expenses because, as of the time of trial, Mr. Hooper had stopped seeing his psychiatrist, Dr. MacGregor. Mr. Hooper's economics expert witness, Dr. Wolfson, calculated the present value of Mr. Hooper's future medical care and lost services at $163,437 and the defense economics expert witness, Dr. Boudreaux, calculated the present value of those items at between $124,695 to $163,964. Those calculations did *not* include future psychiatric care. Additionally, Dr. MacGregor testified that Mr. Hooper will continue to need psychiatric care for at least five years at a cost of at least $148 per visit three times a week. Mr. Hooper testified that he *did* wish to resume seeing Dr. MacGregor. "Future medical expenses need not be established with mathematical certainty. . . . However, they must be established with some degree of certainty and the plaintiff must show that expenses more probably than not will be incurred." *Nuckley v. Gail M. Woods, Inc.*, 94-2190 (La. App. 4th Cir. 4/26/95), 654 So.2d 840, 842. Overall, the evidence would have supported an award of future damages well in excess of that which the trial court found. Under the *Nuckley* test, we certainly cannot say that the trial court was clearly wrong/manifestly erroneous in awarding as much as it did for future medical care and loss of services.

Dunlap Marine argues that the trial court erred in its award of damages for loss of past and future wages and

fringe benefits because, even absent the accident at issue, Mr. Hooper's condition would have prevented him from earning those wages and fringe benefits. Mr. Hooper argues that the trial court awarded inadequate amounts for lost past and future wages and lost future fringe benefits.

> Damages for impairment of earning capacity cannot be calculated with mathematical certainty and the trial court is accorded broad discretion.
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> * * *
>
> An appellate court should not disturb an award unless the record shows that the trial court abused its much discretion. The question is whether the evidence and justifiable inferences support the award.

Perez v. State. Dept. of Transportation and Development, 578 So.2d 1199, 1206 (La. App. 4th Cir.), *writ denied*, 581 So.2d 706 (La. 1991).

Dunlap Marine argues that Mr. Hooper's preexisting back condition would have continued to worsen so that, even absent his accident, Mr. Hooper would not have been able to continue working as a marine electrician. However, Dr. Ruel testified as to Mr. Hooper's history of "bouncing back" and returning to his regular work after periodic flare-ups of, or injuries to, his back. Also, Mr. Hooper's own testimony of his determination to keep working is well-supported by his pre-accident undisputed history of avoiding surgery, pursuing conservative treatment, and returning to work fairly promptly after back flare-ups or injuries. Dunlap Marine points to no medical testimony which *directly* supports Dunlap

Marine's theory that Mr. Hooper would have had to quit work prematurely because of his back condition. One *could* reasonably *infer* support for Dunlap Marine's position from Dr. Ruel's testimony. However, deciding which inferences to make is primarily the task of the finder of fact. The trial court's written Reasons For Judgment reflect that the trial court was fully cognizant of Mr. Hooper's preexisting back condition and, presumably, considered it when fixing the amount of lost wages and fringe benefits. Based upon the evidence, we cannot say that the trial court was clearly wrong/manifestly erroneous in its evident conclusion that Mr. Hooper would have had a nearly normal work life span but for the accident at issue.

The trial court found the lost wage calculations of the defense economist expert witness, Dr. Ken Boudreaux, to be more reasonable than those of the plaintiff's economist expert witness, Dr. Wolfson. Mr. Hooper argues that this was error because Dr. Wolfson calculated Mr. Hooper's worklife expectancy at 10.21 years (i.e. to age 65) whereas Dr. Boudreaux calculated Mr. Hooper's worklife expectancy at 6.94 years (i.e. the average from U.S. Department of Labor Statistics). Mr. Hooper argues that Dr. Wolfson's testimony should have been relied upon because of Mr. Hooper's testimony that, prior to his accident, he intended to work until age 65. We believe the trial court was reasonable in weighing Mr. Hooper's preexisting physical condition against Mr. Hooper's pre-accident interest in continuing to work and in deciding that Dr. Boudreaux's calculations were more reasonable. Thus, we cannot say that the trial court was clearly wrong/manifestly erroneous in this regard either.

Mr. Hooper also argues that the trial court erred in using Dr. Boudreaux's lost wage calculations which were based upon the assumption that Mr. Hooper, while unable to work as a marine electrician, would be able to obtain and maintain a minimum wage job. The trial court, in its written Reasons For Judgment, specifically found: "While it is unlikely that Mr. Hooper will be able to find another occupation that pays as much as his job with Gulf Best and, at the same time, allows for his physical restrictions, this Court does believe that he could find some minimum wage work." Dr. James Williams, a defense expert orthopedic medical witness, testified that Mr. Hooper could perform sedentary work. Mr. Larry Stokes, plaintiff's vocational rehabilitation expert witness, testified that Mr. Hooper would be able to earn minimum wage if medically released to do sedentary work. Thus, we cannot say that the trial court was clearly wrong/ manifestly erroneous in its finding that Mr. Hooper could return to work at a minimum wage job and in relying upon Dr. Boudreaux's wage loss calculations which were based upon that assumption.

Mr. Hooper argues that the trial court intended to award $172,022.52 for past lost wages but, by some sort of error, awarded $148,079 instead. Specifically, Mr. Hooper argues that the trial court intended to award the amount of past lost wages calculated by Dr. Boudreaux and that, at page 517 of the transcript, in response to questions by the trial court, Dr. Boudreaux calculated the past lost wages as $172,022.52 (actually, at page 517 of the transcript, Dr. Boudreaux calculated the past lost wages at the slightly higher figure of $172,222.52). The trial court's written Reasons For Judgment does states that *"following*

the testimony of Dr. Boudreaux, whose calculations the court finds to be the most reasonable, the court awards Mr. Hooper $177,222.00 in lost future wages, $21,266.64 in lost fringe benefits (12%) and $148,079.00 in past lost wages" (emphasis added). We also note that, at page 519 of the transcript, and again in response to questions of the trial court, Dr. Boudreaux calculated the *future* lost wages at $177,000 *exactly* rather than the $177,220.00 awarded by the trial court. It may be that the trial court awarded the past and future lost wages exactly as it intended. However, it appears possible that the trial court made some slight errors from what it intended as to the past and future lost wages. Because we must remand with respect to the award of prejudgment interest (discussed below), we will vacate the awards of past and future lost wages and fringe benefits so that the trial court may correct any errors that occurred as to those amounts. If the trial court determines that there were no errors as to the past and future wages and fringe benefits, then it may reiterate its prior judgment as to those amounts and explain its calculation of those amounts in case of any further appeal.

Dunlap Marine argues that the trial court erred by awarding prejudgment interest on awards of *future* damages. The trial court awarded general damages in three sums captioned "Physical Pain and Suffering (including sexual dysfunction)." "Mental Anguish and Emotional Pain (including sexual dysfunction)" and "Permanent Disability." Mr. Hooper argues that these three awards of general damages were all for past losses. But that would necessarily imply that the trial court awarded nothing at all for future general damages. While possible, that seems

unlikely. Therefore, we must assume, for purposes of this appeal, that some portion of the general damages awarded was for past damages and some portion was for future damages. Under maritime law, prejudgment interest may not be awarded on *future* damages. *Milstead v. Diamond M. Offshore, Inc.*, 95-2446 (La. 7/2/96), 676 So.2d 89, 96-98. Therefore, we must remand so that the trial court may apportion the general damages into past damages and future damages and award prejudgment interest only upon the past general damages and not upon the future general damages. *Id.*

The trial court awarded Mr. Hooper's wife $50,000 for loss of consortium. Dunlap Marine argues that, as a matter of law, an award for loss of consortium is not permissible. We agree. Under the controlling caselaw of this Court, maritime law does not allow recovery for loss of consortium. *Vedros v. Public Grain Elevator of New Orleans, Inc.*, 620 So.2d 1376 (La. App. 4th Cir. 1993). Thus, we must reverse the award for loss of consortium.

Lastly, Dunlap Marine argues that the trial court erred by striking Dunlap Marine's request for a jury trial. Dunlap Marine concedes that, under Article 1732(6) of the Louisiana Code of Civil Procedure, Dunlap Marine was not entitled to a jury trial in this designated general maritime law action. But Dunlap Marine also argues that Article 1732(6) is unconstitutional. However, Dunlap Marine also concedes that the Louisiana Supreme Court, in *Parker v. Rowan Companies, Inc.*, 599 So.2d 296 (La.), *cert. denied*, 113 S.Ct. 203 (1992), has held that Article 1732(6) is constitutional. We are, of course, bound by that decision of the Louisiana Supreme Court.

For the foregoing reasons, we reverse the award for loss of consortium, remand for the trial court to apportion the general damages into past general damages and future general damages and to award prejudgment interest only upon the past general damages, remand so that the trial court may determine whether there are any errors in the awards of lost wages and fringe benefits, and otherwise affirm the judgment of the trial court.

REVERSED IN PART;
REMANDED IN PART;
AND OTHERWISE AFFIRMED.

Thirty-Fourth Judicial District Court
PARISH OF ST. BERNARD
STATE OF LOUISIANA

NO. 72-337 DIVISION "B"

PAUL RICHARD HOOPER, ET AL

VERSUS

DUNLAP MARINE SERVICES, INC., ET AL

Filed: November 14 1996 /s/ Hope Henderson
Deputy Clerk

REASONS FOR
JUDGMENT

Plaintiff Paul Hooper was injured on March 11, 1992, when he tripped on a high pressure hose lying across the main deck of the S/S PONCE. Mr. Hooper was employed at the time by Gulf Best Electric, which was hired to install alarms on the ship in preparation for "mothballing." The owner of the ship is Puerto Rico Marine Management, Inc. (PRMMI), a defendant herein. Dunlap Marine Services, Inc. (Dunlap), also a defendant herein, was also working on the ship at the time of the accident. Dunlap was a subcontractor hired to prepare for mothballing certain tanks aboard the vessel. It used high pressure hoses in the course of its work, and was the owner of the hose upon which Mr. Hooper tripped.

On the date of the accident, Mr. Hooper was leaving the vessel carrying a twenty pound tool bag in his right hand and an eight pound drill in his left hand. A coworker, Norman Shows, preceded him off the main deck, Mr. Hooper testified that as he attempted to cross over the high pressure hose and a fire hose, which were lying

side by side, the high pressure hose pulsated and flexed, causing him to trip and fall to his knees. As he fell, Mr. Hooper claims he twisted his back, aggravating a previous back injury.

Captain Claude Davenport, who qualified as an expert in marine safety, testified that hoses stretched across the deck of a vessel in an area where workers walk during the course of their jobs, pose an unreasonable risk of harm. The Court agrees with Capt. Davenport's opinion. Also, although under the facts of this case, the Court is not bound to follow OSHA regulations, they do serve as a guideline for good safety practices aboard ships. Accordingly, the Court finds Dunlap to be sixty percent at fault for this accident because they owned the hoses in question, and they placed the hoses across the deck when reasonable alternative methods of routing the hoses were available to them. Dunlap created a hazard for its own employees and all other workers on the vessel. The court finds PRMMI fifteen percent at fault because there was a PRMMI employee, the port captain, on board who was aware of the hoses and could have directed that they be moved or re-routed in a safer manner.

The Court was not persuaded by the testimony of George Duffy. Mr. Duffy, who was accepted an an [sic] expert in marine safety, attempted to play both sides of the fence by claiming that oil on the deck would pose an immediate safety hazard that should be remedied immediately because a worker may not be able to see oil, and could step in it and carry it all over the deck. However, he opined that the hoses stretched across the deck did not pose an unreasonable risk of harm because they were easy to see, and because it was common practice to lay

hoses across the deck of vessels. Therefore, experienced marine workers should be aware of the possibility of hoses on the deck and should take necessary precautions to avoid injury. On cross-examination, however, Mr. Duffy admitted that the hoses on the deck were violations of OSHA regulations, although he pointed out that those regulations were not applicable in this situation, and that the hoses violated applicable marine safety standards. Upon questioning by the Court, Mr. Duffy could not dispute the fact that there were much safer alternatives for routing the hoses in question, thus eliminating the tripping hazard.

The Court is of the opinion that the hoses, both the high pressure hose in question and a fire hose, placed across the deck by Dunlap, created an unreasonable risk of harm. The hoses were lying at the top of a ramp where workers walked frequently, carrying tools, and were vehicular traffic passed. It was foreseeable that in this environment, a worker could trip on the hoses.

The Court finds, however, that Mr. Hooper was twenty five percent at fault for his accident. He could have used an alternate, albeit less convenient, route to exit the ship.

Since the date of the accident, Mr. Hooper has been unable to work. Testimony at trial revealed that Mr. Hooper has undergone back surgery, specifically a two-level fusion at L4-5 and L5-S1, with accompanying laminectomy and discectomy. He claims this surgery was necessitated because of the March 11, 1992 accident, which aggravated and worsened his pre-existing back injury.

Dr. Robert Ruel, a board certified orthopedic surgeon, gave expert testimony that he first saw Mr. Hooper in 1982 for a back injury. Over the ensuing years, Mr. Hooper treated intermittently for flare-ups. In January of 1987, Mr. Hooper re-injured his back at work, and Dr. Ruel noted at that time a central and left disc bulge at L4-5 and a central disc bulge at L5-S1. Dr. Ruel testified that he suggested surgery, a laminectomy and discectomy, at that time, but after obtaining a second opinion, Mr. Hooper decided against it. He continued to work and receive conservative treatment for his back. Mr. Hooper also continued jogging and playing golf during this time.

In early 1989 and again in early 1991 Mr. Hooper underwent MRI testing. The results of both tests were virtually identical: protrusion of disc at L4-5 and L5-S1. Again, Dr. Ruel discussed surgery with Mr. Hooper, but Mr. Hooper elected to continue conservative treatment, and to continue working.

Dr. Ruel first learned of Mr. Hooper's March 11, 1992 accident when Mr. Hooper telephoned him with the details of the accident. Mr. Hooper's chart reflected an April 2, 1992 notation that the patient was getting worse, he could not jog anymore and he was gaining weight. Mr. Hooper told Dr. Ruel in early 1993 that he could no longer stand the pain, and was ready to try surgery to relieve his pain. On April 14, 1993 Dr. Ruel performed a two-level lumbar fusion at L4-5 and L5-S1, with accompanying laminectomies and a one-level discectomy. Dr. Ruel testified that this more complicated surgery caused more prolonged pain than a simple laminectomy, and that the fusion caused a higher disability rating because of the patient's restricted motion. He also stated that Mr.

Hooper's surgery was less than successful. He still has not released Mr. Hooper for any type of work. Dr. Ruel testified that the March 11, 1992 accident aggravated Mr. Hooper's pre-existing back condition, causing him increased pain. Further, the March 11, 1992 accident necessitated the lumbar fusion.

Testimony from Dr. John Macgregor, an expert in psychotherapy and psycoanalysis [sic], revealed that Mr. Hooper suffers from a mixed depressive anxiety disorder brought about by plaintiff's inability to continue as the breadwinner for his family. Mr. Hooper suffers from mood swings and is often short-tempered and irritable because of his condition. Several former co-workers, who were also personal friends of the plaintiff, also testified that his personality has changed since the accident.

Dr. Baptiste Brunner, a board certified urologist, testified that Mr. Hooper suffers from a physical sexual dysfunction directly related to his back injury of March 11, 1992. Mr. Hooper has tried varied treatments for this problem, including painful injections, to no avail.

Based on all the expert testimony, this Court finds that Mr. Hooper's injury and subsequent medical conditions are directly related to his accident of March 11, 1992. He has not been able to work since the subject accident, and as of the date of trial, was not released to return to work by Dr. Ruel. The physical restrictions placed upon Mr. Hooper will not allow him to return to work as a marine electrician.

Larry Stokes, an expert in vocational rehabilitation counseling, testified that Mr. Hooper has an eighth grade education, and is not well-suited to begin a new career at

his age. His personality does not indicate a suitability for sales, and his physical limitations hamper his chances of finding other work more closely related to his previous occupation. While it is unlikely that Mr. Hooper will be able to find another occupation that pays as much as his job with Gulf Best and, at the same time, allows for his physical restrictions, this Court does believe that he could find some minimum wage work. Accordingly, following the testimony of Dr. Ken Boudreaux, whose calculations the Court finds to be the most reasonable, the Court awards Mr. Hooper $177,222.00 in lost future wages, $21,266.64 in lost fringe benefits (12%), and $148,079.00 in lost past wages.

As to Mr. Hooper's medicals, the court awards $69,747.48 in past medicals, and $139,000.00 in future medicals and loss of services.

The remaining damages are awarded in accordance with the judgment rendered herein.

Chalmette, Louisiana, this 14 day of November, 1996.

/s/ David S. Gorbaty
JUDGE

34TH JUDICIAL DISTRICT COURT FOR THE
PARISH OF ST. BERNARD

STATE OF LOUISIANA

NO. 72,337 DIVISION "B"

PAUL RICHARD HOOPER, ET AL.

VERSUS

DUNLAP MARINE SERVICES, INC., ET AL.

FILED: January 8, 1997 /s/ Hope Henderson
DEPUTY CLERK

JUDGMENT

This matter came for trial on September 30 – October 2, 1996, and for argument on the post-trial motions on December 13, 1996.

PRESENT: Virgil A. Lacy, III,
Attorney for Plaintiffs

Jeffrey Raines,
Attorney for Dunlap Marine Service, Inc., and its insurers

Gerard T. Gelpi and
G. Beauregard Gelpi,
Attorneys for Puerto Rico Marine Management, Inc., and its insurer

Lyon H. Garrison,
Attorney for Highlands Insurance Company

After considering the pleadings, evidence, arguments of counsel, stipulations, testimony of witnesses, post-trial motions, and for the reasons described in the Court's Reasons for Judgment dated November 14, 1996;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of Paul Richard Hooper and Louise S. Hooper, and against Dunlap Marine Services, Inc., Puerto Rico Marine Management, Inc., and Liverpool & London Protection & Indemnity Association, Ltd., *in solido*, as described below.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of plaintiffs and jointly against the insurers of Dunlap Marine Services, Inc. with each insurer being liable only for its proportion as follows:

David Ean Coleridge, as nominee for Certain Underwriters at Lloyds, London	27.860%
London & Hull Maritime Insurance, Co Ltd T A/C	9.950%
The Yorkshire Insurance Co Ltd L A/C	9.950%
Commercial Union Assurance Company PLC	4.975%
The Prudential Assurance Co Ltd Trust A/C No 2	4.976%
Cornhill Insurance PLC A/C (90%) and Allianz International Insurance Co Ltd	7.462%
Bishopsgate Insurance Ltd N A/C	4.976%
Northern Assurance Co Ltd No 6 A/C	3.980%

Sphere Drake Insurance PLC No 2 A/C (80%) and Dai-Tokyo Insurance Company (UK) Ltd (20%)	3.980%
Ocean Marine Insurance Co Ltd	9.950%
Hansa Marine Insurance Co (UK) Ltd T GRP (50%) and Vesta (UK) Insurance Co Ltd (50%)	2.488%
Minster Insurance Co Ltd 3 A/C	1.990%
	92.537%

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Dunlap's insurers are not liable for the first $5,000.00 of damages assessed against Dunlap as these insurers' policies contain a $5,000.00 deductible.

PAUL RICHARD HOOPER:

Physical Pain and Suffering (including sexual dysfunction)	$200,000.00
Mental Anguish and Emotional Pain (including sexual dysfunction)	100,000.00
Permanent Disability	100,000.00
Lost Past Wages	148,079.00
Lost Past Fringe Benefits	27,231.41
Past Medical Expenses	69,747.48
Sub-total (Past Losses)	$645,057.89
Lost Future Wages	177,222.00
Lost Future Fringe Benefits	21,266.64

Future Medical Expenses and Loss of Service	139,000.00
TOTAL FOR PAUL RICHARD HOOPER	$982,546.53
LOUISE S. HOOPER:	
Loss of Consortium	$50,000.00
TOTAL FOR LOUISE S. HOOPER	$50,000.00

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that percentages of fault are allocated as follows:

Paul Richard Hooper	25%
Puerto Rico Marine Mangement, Inc.	15%
Dunlap Marine Services, Inc.	60%
TOTAL	100%

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiffs are awarded expert fees in the amount of $450.00 per expert.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Highlands Insurance Company's intervention is to be recognized, and that Highlands Insurance Company is to be paid the sum of $218,849.65 from the first dollar of the Judgment in favor of Paul Richard Hooper, and against all defendants. Additionally, the Court recognizes that Highlands Insurance Company is entitled to a credit against any future longshore benefits due Paul Richard Hooper as the result of the March 11, 1992 accident, equivalent to Mr. Hooper's net recovery from the Judgment, as provided by law.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Paul Hooper and Louise Hooper are awarded costs (subject to filing of a motion to tax costs and judgment thereon), expert fees as described above, pre-judgment interest from March 11, 1992 to the date of signing of this Judgment, at the legal rate prescribed by Louisiana law on all awards except those for future lost wages, future fringe benefits, and future medical expenses and loss of services. Plaintiffs are also awarded post-judgment interest at the legal rate prescribed by Louisiana law on all awards, commencing to run on the date this Judgment is signed. The Court further orders that all costs and expert fees be shared by the defendants and their respective insurers in these proportions:

Dunlap Marine Services, Inc.	80%
Puerto Rico Marine Management, Inc.	20%

JUDGMENT READ, RENDERED AND SIGNED this 8th day of January, 1997, at Chalmette, Louisiana.

/s/ David S. Gorbaty
JUDGE

The Supreme Court of the State of Louisiana

PAUL RICHARD HOOPER, ET AL

VS. NO. 98-C-1436

DUNLAP MARINE SERVICES, INC., ET AL

IN RE: Puerto Rico Marine Mngmnt Inc.; Liverpool & London Protection; – Defendant(s); Applying for Writ of Certiorari and/or Review; Parish of St. Bernard 34th Judicial District Court Div. "B" Number 72,337; to the Court of Appeal, Fourth Circuit, Number 97CA-1727

September 4, 1998

Denied.

HTL

WFM

CDK

BJJ

CDT

JTK

VICTORY, J. not on panel.

Supreme Court of Louisiana
September 4, 1998

/s/ John Olivier
Clerk of Court
For the Court

Thirty-Fourth Judicial District Court
PARISH OF ST. BERNARD
STATE OF LOUISIANA

NO. 72-337 DIVISION "B"

PAUL RICHARD HOOPER, ET AL.

vs.

DUNLAP MARINE SERVICES, INC., ET AL.

Filed: November 17 **1998** /s/ Hope Henderson
Deputy Clerk

REVISED JUDGMENT AFTER REMAND

This matter came before the Court for trial on September 30-October 2, 1996, for argument on the post-trial motions on December 13, 1996, and for review on remand from the Fourth Circuit Court of Appeal on October 23, 1998.

After considering the pleadings, evidence, arguments of counsel, stipulations, testimony of witnesses, post-trial motions, the reasons described in the Court's Reasons for Judgment dated November 14, 1996, and the Fourth Circuit Court of Appeal's Opinion date April 29, 1998;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of Paul Richard Hooper and against defendants, Puerto Rico Marine Management, Inc., and Dunlap Marine Services, Inc., as follows:

PAUL RICHARD HOOPER:

Physical Pain and Suffering (including sexual dysfunction):

Past	$ 100,000.00
Future	$ 100,000.00

Mental Anguish and Emotional Pain (including sexual dysfunction):

Past	$ 50,000.00
Future	$ 50,000.00

Permanent Disability:

Past	$ 50,000.00
Future	$ 50,000.00

Lost Wages:

Past	$ 172,222.52
Past Fringe Benefits (12%)	$ 20,666.70
Future	$ 177,000.00
Future Fringe Benefits (12%)	$ 21,240.00

Medicals:

Past	$ 69,747.48
Future and Loss of Services	$ 139,000.00
TOTAL	$ 999,876.70

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the other provisions of the Court's Judgment dated January 8, 1997 remain in effect.

JUDGMENT READ, RENDERED AND SIGNED at Chalmette, Louisiana on this 17th day of November, 1998.

/s/ David S. Gorbaty
JUDGE

34TH JUDICIAL DISTRICT COURT
PARISH OF ST. BERNARD
STATE OF LOUISIANA

PAUL RICHARD HOOPER, ET AL — NO: 72-337

VERSUS

DUNLAP MARINE SERVICES, INC., ET AL — DIVISION "B"

* * *

(Hooper)

[p. 79] Q. Did you ever complain to anyone during the entire time you were on the PONCE about the position of the hoses?

A. No, I have not.

Q. You never considered them a hazard until after you fell?

A. That is correct.

Q. What were you carrying – you told the Court before; I apologize for asking – at the time you fell?

A. I had a tool bag with approximately 20 pounds of tools. Wrenches, screwdrivers, small socket sets, in a canvas bag. I had my meter in my right hand. The company had a small portable drill in a case, in my left hand.

Q. What was the total of weight you were carrying, to your best estimate?

A. Twenty-eight pounds.

Q. What type of work was Gulf-Best doing? You mentioned they were putting in some alarms?

A. We were installing intrusion alarms, fire and smoke alarms.

Q. That was part of Gulf-Best's specialty work they did?

A. In general, yes. We do that type of work.

Q. And you brought your own tools?

A. Correct.

Q. Now, what was Dunlap doing; do you know? You mentioned cleaning some

* * *

(Shows)

[p. 143] A. Yeah.

Q. Is it fair to say when you are walking on a ship you have to be careful about where you are walking?

A. Well, wherever you work you have to be careful, sure.

Q. And do you really watch where you are stepping and where you are walking?

A. That is hard to say. I do my job and I just know – I can't say I watch all the time, no.

Q. But usually you do?

A. Yes, I guess.

Q. At the time of this accident I think you had been working with Mr. Hooper for three years?

A. Approximately.

Q. And you worked some odd years before with Gulf-Best?

A. Yes.

Q. Before the accident were you a marine electrician for all these years?

A. Yes.

Q. So you are an experienced marine electrician?

A. Yes, I would say I am.

Q. Prior to this accident did you think that those hoses constituted a hazard where they were, by the ramp?

A. Yes, they could have.

Q. Did you report that to anybody?

A. No.

[p. 144] Q. And why not?

A. It never does any good.

Q. Did you even talk about that with Mr. Hooper?

A. About reporting?

Q. Did you tell Mr. Hooper those hoses might be a hazard?

A. No.

Q. If you were looking where you were going you could cross the hoses safely?

A. I guess so, yes.

Q. You, in fact, did?

A. I guess I did.

Q. Do you remember if there was an alternate way down from that deck, from the main deck to the second deck other than that ramp?

A. (No response.)

Q. If you don't remember, that is fine.

A. I guess there might have been if you went through the house and down through the engine room. But that is – it was not logical to go that way.

Q. You all were leaving the ship?

A. As far as I recall, I think we were going to lunch. I am not sure of that.

Q. When you go to lunch, do you take your personal tools off with you?

A. Sometimes.

Q. If you are working with equipment, do you take it and put it back up in the tool room?

* * *

(DelBuno)

[p. 160] golf with Mr. Hooper once a year for the most part?

A. Once or twice a year, yes.

Q. You talked about some personality changes you noticed in Mr. Hooper. Despite all that, you are still friends?

A. Yes.

Q. Still have a close relationship?

A. Yes.

Q. Mr. Lacy asked you some questions about hoses on decks or on ramps, and I was not sure, I couldn't see if he was referring to – is this the type of conditions you were talking about when answering the question?

A. I have seen hoses across decks before, yes.

Q. You have been personally confronted with a situation like that?

A. Yes.

Q. Did you cross hoses like this?

A. Yes.

Q. And when you were faced with hoses in a condition like this, did you consider them to be a hazard?

A. Anything you have, anything on the deck, it is a hazard.

Q. Anything else?

A. Anything, yes.

Q. The hoses you saw on the deck similar to the condition in 2-C, was that a hazard? You being an experienced marine [p. 161] electrician, was that a hazard you could deal with if you were being careful?

A. Yes, you could cross them safely if you were being careful.

Q. When you work on ships, as you said, there is always something on the deck?

A. Yes, most of the time.

Q. So you have to be careful when walking?

A. Yes, right.

BY MR. BEAU GELPI:

Thank you, Mr. Del Buno. No further questions.

EXAMINATION

BY MR. RAINES:

Q. I show you a document I have marked as Dunlap Exhibit 10. Would you look at this document, please? Take your time.

BY MR. LACY:

What document is this? I have objection to this one.

BY THE COURT:

Well, let him look at it. I have no problem with him looking at it first.

BY MR. LACY:

This first came to us at 4 o'clock on Friday.

BY THE COURT:

Go ahead and read it and tell me when you are ready to discuss it.

BY THE WITNESS:

* * *

(Prejeant)

[p. 176] Q. Isn't it true in your deposition you didn't really believe the hose depicted in that picture represented a hazard?

A. Okay. That particular picture, yes.

Q. And you think these hoses are a hazard, as shown in 2-B?

A. I guess what I was saying during the deposition was that normally, you know, hoses are on the deck of a ship.

Q. That is a common occurance?

A. Yes, it is a common occurance. Whether it is a tripping hazard – actually, yes, it is. I guess anything laying on the deck would be considered a tripping hazard.

Q. Including the tie downs they have for securing containers?

A. Sure.

Q. Even if it's a hazard, in 2-B and 2-C, if these hoses presented a hazard, you, as the general superintendent of Gulf-Best, would expect that your experienced marine electricians would handle that safely if they were using caution?

A. Say it again?

Q. At Gulf-Best you hire experienced marine electricians?

A. Yes.

Q. If you send one of your experienced marine electrians out to a job and he encountered a situation like is shown in [p. 177] 2-B and C, don't you think he could cross those safely if he was being careful?

A. Yes.

Q. You always have to be careful when walking on a ship?

A. Yes. You always have to watch where you are stepping, yes.

Q. I am not sure if I asked you before. I know you said it was common to have hoses such as depicted in the photos on a deck. Is it more common than unusual when you go to work on a ship that you will have hoses like that?

A. I would say more common with a ship being laid up for repairs, yes.

Q. When you go to work on a ship being laid up for repairs, hoses on a deck is a condition which you have to anticipate, right?

A. It's an [sic] common situation.

Q. I am a little unclear on some of your answers to Mr. Lacy's questions. So if I go over this again, I apologize.

Gulf-Best was aware that Mr. Hooper had had surgery recommended prior to this March of 1992 accident; isn't that true?

A. I was told by Paul that the doctors had suggested surgery.

Q. Before this accident?

A. Well, I am a little unclear. I don't

* * *

(Davenport)

[p. 218] could see it was rigged so poorly that he could fall if he stepped on it or let his men step on it, do you think it was good marine practice for him to report that?

A. Yes.

Q. But that is not in the report area, is it?

A. No. But if he steps on it and was going to fall, it is the same thing as walking on a deck and having a big hole and say, "I am not going to pay attention, I am going to step in the hole." Of course he would pay attention, but he is not working around there.

Q. But you have to pay attention when working on a vessel?

A. Yes, absolutely.

Q. If you see an unsafe condition, especially if you are the foreman, because you have men under you who are your responsibility, isn't it good marine practice to report that?

A. It could be done, yes.

Q. I know it can be done. Wouldn't it be good marine safety practice?

A. If you are a foreman and have your people going through there, yes, it would.

Q. Now, do you think that a person has to be an expert in marine safety to [p. 219] recognize these hoses as being unsafe, as you characterize it?

A. It certainly is beneficial to be a marine safety expert to recognize it, yes. A lot of times workers don't pay any attention to it. They just come onboard and work; that's all.

Q. I direct your attention to your deposition which was taken on September 13th, 1996; earlier this month.

A. Yes.

Q. I direct your attention to Page 113, Lines 13 through 17. Would you review that, please?

BY THE COURT:

Read it to yourself, please. Then when you are complete, tell me when you have completed reading it. Tell me you are ready.

BY THE WITNESS:

Yes.

BY THE COURT:

All right, Mr. Raines.

BY MR. RAINES:

Q. Do you recall me asking you at that time. "Do you think a person has to be an expert in marine safety to

recognize these hoses as presenting a hazard?" And your answer being, "No"?

A. You don't have to be an expert to recognize a hazard.

Q. All right. Did you say on your [p. 220] direct examination that Mr. Lacy actually pointed out that OSHA regulation to you on the first time he called you on the case?

A. No, it was another one he mentioned.

Q. He mentioned another one?

A. I think 1910.3 or something like that. I don't recall. He might have asked about this particular one. But I have the book and went and got the book out of my library to look at.

BY THE COURT:

Mr. Raines, let me interrupt you. While we are on that, let me correct something. Mr. Lacy referred to Judicial Notice Number 1. I think it is actually Number 2. I wanted to correct that.

BY MR. RAINES:

Q. Do you think somebody working on a ship for years and is experienced could step over these hoses depicted in 2-B safely if they are being careful?

A. What page?

Q. I am just asking you a question. I am not referring to your deposition. I am moving on to a different area. I am sorry. You want me to repeat the question?

A. Yes.

Q. Do you think a person who has about working on ships for years and is

* * *

(Duffy)

[p. 593] A. It would not matter.

Q. Whether it is a hazard or not depends on the condition, the facts of the condition itself, right?

A. That's correct, sir.

Q. And you have acted on behalf of the vessel during ship repairs and ship cleaning?

A. Yes.

Q. If you saw a condition such as 2-B, would you have taken steps to intervene?

A. No, I would not.

Q. Why not?

A. Because it is normal. The hoses have to run in an open deck area like that. And just like on the other photographs, you have to use them on the ship to do the work. So therefore they have to transit the vessel.

Q. And can they be dealt with safely if an experienced person is using caution?

A. Yes, they can.

BY MR. BEAU GELPI:

That is all all I have. Thank you.

EXAMINATION

BY MR. LACY:

Q. Your practice as manager of your company is to run hoses along the deck of the vessel, is that right?

A. My practice?

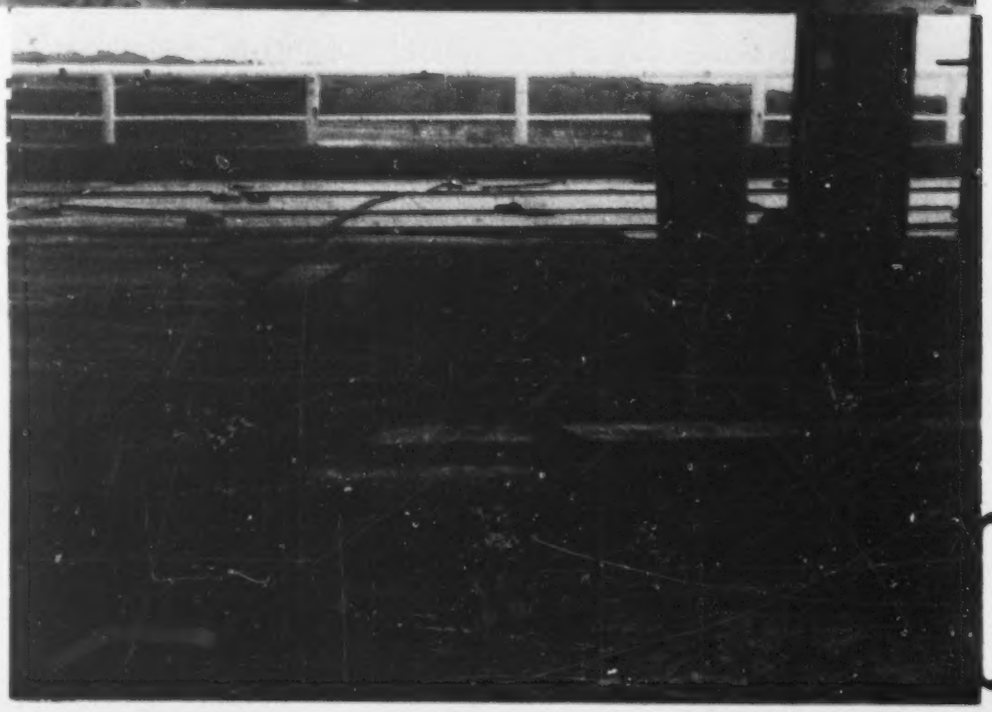
Q. Yes.

* * *

BEST AVAILABLE COPY

A

B



C

#72-337
Filed
Sept 30 1996
Joyce Richardson
Dep Clk

PLAINTIFF'S EXHIBIT 2